**Re Kenya National Federation of Co-operatives Ltd and others**

**Division:** High Court of Kenya at Nairobi

**Date of ruling:** 1 March 2005

**Case Number:** 1621/04

**Before:** Ibrahim J

**Sourced by:** N Regeru

**Summarised by:** M Kibanga

*[1] Judicial review – Application for leave to apply for judicial review – Applicant not making a full*

*disclosure of facts – Whether applicant under duty to make full material disclosure of facts to court.*

*[2] Judicial review – Application for leave to apply for judicial review – Leave and stay granted –*

*Application made to set aside the stay and for dismissal of application for leave – Affidavit supporting*

*application sworn by a director without a resolution of the board of directors – Whether affidavit*

*admissible.*

**Editor’s Summary**

The Kenya National Federation of Co-operatives Limited (KNFC) filed an application seeking leave to apply for judicial review to squash the decision of the Communication Commission of Kenya (CCK) which has granted a global service mobile (GSM) licence to accompany called Econet Wireless Kenya Limited (EWK). KNFC also sought an order of *mandamus* compelling CCK to grant KNFC the GSM license. The application for leave was granted and was to operate as a stay pending the hearing and determination of the main application. It was ordered that EWK be made a party to the proceedings. EWK was aggrieved by the granting of the leave to stay and filed an application for the Court to discharge the stay under and dismiss the KNFC’S application. The grounds of the application were *inter alia* that KNFC had not made material disclosure in its application of 26 November 2004. Rapsel Limited, a member of EKW, opposed the application on the ground that one Zachary Wazara who had sworn to the affidavit on behalf of EWK was not authorised or competent to do so. The objection was preliminary in nature. The objection was opposed on the ground that Mr Wazara was presumed, as the director, to have authority to swear to the affidavit. It was argued that Mr Wazara’s interest in EWK conflicted with those of the other shareholders.

**Held** – The issue of directorship was contended by both sides and raised facts which required evidence to be determined by the Court. It was not a pure point of law. The action of Mr Wazara to instruct counsel and to swear to an affidavit was done *bona fide* to protect the company’s asset, namely the GSM licence and there was no suggestion that action was done *ultra vires.* The act was capable of ratification by the board of directors; *Banford v Banford* [1969] All ER 969 adopted. The objection raised on the basis of there being conflict between Mr Wazara’s interest and those of the other shareholders was again one of fact. The Court had no jurisdiction to deal with any internal company conflicts under Order LIII. Although EWK was an interested party or a secondary respondent it had sufficient interest in the matter, the licence being its asset, to bring the application. The non-disclosure of material facts by KNFC in the application for leave was deliberate and calculated and had the said facts been disclosed the Court might have reached a different conclusion. The rule of the Court requiring *uberimae fides* on the part of an applicant for an *ex parte* injunction applies equally to the case of an application for a writ of prohibition*, King v General Commissioners for Purposes of the Income Tax Acts for the District of Kesisington* [1917] 1 KB 48; *R v Metropolitan Police Force Disciplinary Tribunal, ex parte Lawrence* [1999] EWHC Admin 588; *R v Leeds City Council ex parte Hendry* [1994] Admn LR 444 D all approved*; Uhuru Highway Development Ltd v Central Bank of Kenya and others* [1995] LLR 389 (CAK) applied*, Memory Corporation PLC v Sidhu (number 200)* 1 WLR 1443 applied. The Court must insist on strict compliance with the rules pertaining to nondisclosure in order to afford protection to the absent parties at the *ex parte* stage. The order of stay was discharged and the KNFCS application for leave dismissed with costs.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Bugerere Coffee Growers Ltd v Sebaduka and another* [1970] EA 147 – **C**

*Kenya Telecommunications Investment Group Limited v Elecommunication 7 Commission of Kenya*

miscellaneous application number 1267 of 2003 – **AP**

*Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd*[1969] EA 696 – **C**

*Nitin Properties Limited v Kalsi and another* [1989] LLR 289 CAK – **C**

*Uhuru Highway Development Limited v Central Bank of Kenya and others* [1995] LLR 389 (CAK) – **AP**

***United Kingdom***

*Bamford v Bamford* [1969] All ER 969 – **AP**

*Bank Mellat v Nikpour* [1985] FSR 87 – **C**

*Brink’s Mat Ltd v Elcombe and others* [1988] 3 All ER (CA) 188 – **C**

*Dalglish v Jarvie* (1850) 2 Mac & G 231

*Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178 – **C**

*March Rich and Company Holding v Krasner* 1988

*Memory Corporation plc v Sidhu (No. 2)* 1 WLR 1443 – **AP**

*King v General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington ex*

*parte Princess Edmond De Polignac* [1917] 1 KB 487 – **APP**

R v Leeds City Council *ex parte* Hendry [1994] Admn LR 444D – **APP**

*R v Metropolitan Police Force Disciplinary Tribunal ex parte Lawrence* [1999] EWHC Admin 588 –